

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 7, 2007 at Jackson

STATE OF TENNESSEE v. JIM GILMORE

Appeal from the Circuit Court for Grundy County
No. 4262 Buddy D. Perry, Judge

No. M2007-00261-CCA-R3-CD - Filed October 17, 2007

The defendant, Jim Gilmore, entered a plea of guilty to a single count of aggravated assault, and the trial court imposed a sentence of six years' incarceration. In this appeal, the defendant asserts that the trial court erred by denying an alternative sentence. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Robert T. Carter, Tullahoma, Tennessee, for the appellant, Jim Gilmore.

Robert E. Cooper, Jr., Attorney General and Reporter; Alice B. Lustre, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steve Strain, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 16, 2006, the defendant, originally charged with aggravated rape and aggravated assault, entered a plea of guilty to one count of aggravated assault. Pursuant to a plea agreement with the State, the defendant received a sentence of six years with the manner of service of the sentence to be determined by the trial court. In exchange for the guilty plea, the State dismissed the aggravated rape charge.

At the sentencing hearing, the victim testified that the defendant "gagged," "strangled," "raped," and threatened to kill her. She stated that at the time of the offenses, she had recently moved to Grundy County from Florida and had no health insurance to cover the numerous physical injuries she received during the assault. Injuries to her elbow and back required ongoing medical treatment. The victim was unable to return to work after the assault and was approved to receive disability benefits because of "the physical and mental problems that occurred during the rape." The victim testified that she and the defendant had dated prior to the assault, and that their

prior relationship “made it worse because it is somebody that supposedly at one time in your life cared about you and now I have trust issues.” The victim stated that she “never would have dreamed that [the assault] would be that bad on a person.”

The victim testified that after the defendant was arrested, he called her cellular telephone and left a message that had a profound impact on her and her family. She stated that as a result of the offense, her mother was hospitalized with severe depression and had decided to sell her home because “she does not feel safe [t]here anymore.”

The defendant testified that he lived with his parents and helped them by doing “all the heavy lifting of firewood, the mowing, the care of the gardens, the bees, take care of the fireplaces, the chimneys, tractor, bushhogging, [and] care of the pond.” He also stated that he had employment working on “floor systems and firewood.” The defendant, who received an honorable discharge from the United States Navy, admitted that he was an alcoholic and agreed to attend alcohol rehabilitation as a part of his sentence. The defendant admitted that he assaulted the victim but denied sexually penetrating her against her will. He claimed that he assaulted the victim in an attempt to prevent her from driving to Chattanooga while intoxicated. The defendant stated that he felt he had done the victim a favor by preventing her from driving on that night.

The defendant admitted that he telephoned the victim after his arrest and after he was ordered to have no contact with her. The defendant claimed that he placed the call only to apologize to the victim and did not intend to threaten her. The defendant also admitted to a misdemeanor record including convictions for driving under the influence and public intoxication. He also admitted prior drug use. When asked whether he had continued to violate the law by smoking marijuana after the entry of his plea, the defendant said, “And so has she, Your Honor.”

The presentence report indicates that the defendant has six prior misdemeanor convictions in Tennessee, a driving under the influence conviction in Georgia, and one probation violation that occurred in 1995. The defendant also admitted to occasional marijuana use, stating that he had last used marijuana one week prior to the presentencing interview. Although the defendant claimed to have jobs as a “firewood cutter” and a “climber doing ‘tree work’” in the ten years prior to the offense, his employment history could not be verified. The defendant also reported that he spent two years in the Navy but presented no official documentation of his military service. He did present a photograph of his boot camp graduation at the sentencing hearing.

In this appeal, the defendant contends that the trial court erred by denying probation or other alternative sentencing. The State submits that the trial court properly ordered the defendant to serve his entire sentence in confinement.

When a defendant challenges the manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all

relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id.* If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, “even if we would have preferred a different result.” *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. § 40-35-210(a), (b); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

A defendant who is an “especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” T.C.A. § 40-35-102(6). An alternative sentence is any sentence that does not involve total confinement. *See generally State v. Fields*, 40 S.W.3d 435 (Tenn. 2001). As a standard offender convicted of a Class C felony, the defendant is presumed to be a favorable candidate for alternative sentencing. *See* T.C.A. § 40-35-102(6). In addition, because the sentence imposed is ten years or less, the trial court was required to consider probation as a sentencing option. *See id.* § 40-35-303(a), (b). A defendant’s potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The trial court’s determinations of whether the defendant is entitled to an alternative sentence and whether the defendant is a suitable candidate for full probation are different inquiries with different burdens of proof. *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). When, as here, the defendant is entitled to the statutory presumption favoring alternative sentencing, the State must overcome the presumption by the showing of “evidence to the contrary.” *Ashby*, 823 S.W.2d at 169; *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled in part on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000); *see* T.C.A. §§ 40-35-102(6), -103. What constitutes “evidence to the contrary” can be found in Tennessee Code Annotated section 40-35-103, which provides:

Sentences involving confinement should be based on the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. §40-35-103(1).

Conversely, the defendant is required to establish his “suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general.” *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); see T.C.A. § 40-35-303(b); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10. Among the factors applicable to probation consideration are the circumstances of the offense; the defendant’s criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Gear*, 568 S.W.2d 285, 286 (Tenn. 1978).

In this case, the trial court imposed a fully incarcerative sentence based upon its finding that Tennessee Code Annotated sections 40-35-103(1)(B) and (C) were applicable. The trial court found that the telephone call to the victim, which it interpreted as more threatening than apologetic, the defendant’s “total lack of remorse,” and his attempt to place blame upon the victim established that a sentence of incarceration was necessary to avoid depreciating the seriousness of the offense. The trial court also found that the defendant’s prior probation violation and his failure to comply with the no contact order that was a condition of his bond established the defendant’s unwillingness to comply with the requirements of a sentence involving release into the community.

In our view, the record supports the findings of the trial court. Although the transcript of the plea colloquy was not included in the appellate record, the official version of the offense contained in the presentence report, which was not refuted by the defendant, indicates that the defendant attacked the victim after she rebuffed his sexual advances. According to the victim’s testimony at the sentencing hearing, the defendant gagged her, strangled her, and then raped her, all the while threatening her life. She stated that she continues to suffer the physical and mental ramifications of the attack on a daily basis. Her life was irrevocably changed by the event. At the sentencing hearing, however, the defendant attempted to blame the victim for the assault and insisted that he had “done her a favor.” Although he admitted that he assaulted the victim, he refused to take responsibility for his actions. He also admitted that, even though alcohol was a contributing factor in the offense, he continued to abuse alcohol and use marijuana while out on bond. The record

establishes that the defendant did not take the offense seriously. In consequence, a fully incarcerative sentence was necessary to avoid depreciating the seriousness of the offense. Furthermore, the defendant's previous probation violation and violation of the conditions of his bond establish his unwillingness to comply with a sentence involving release into the community.

Accordingly, the judgment of the trial court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE